(23)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Revision No.40 of 2002

APPLICANT/:
ACCUSED

Gulam Mohammad,
S/o Late Gulab Khan,
Aged about 52 years,
Resident of Nurani Chowk,
Raja Talab, Raipur,
Tehsil & Distt.: Raipur (C.G.)

- Versus -

NON-APPLICANT/:
COMPLAINANT

Girjanand,
S/o Hira Singh Chandrakar,
Aged about 52 years,
Resident of Subhash Nagar,
Kasari Dih, Durg,
Tehsil & Distt.: Durg (C.G.)

POST FOR ORDER ON *13th MAY, 2004*

Sd/-
L.C. BHADOO
Judge
12.5.2004

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Present: -

Mrs. Renu Kochar, Advocate: For the applicant

Mr. Vishnu Koshta, Advocate: For the non-applicant/complainant

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Before: Hon'ble Mr. Justice L.C. Bhadoo

O R D E R

(Passed on 13th May, 2004)

1. The accused/applicant has preferred this criminal revision under Section 397 read with Section 401 of the Cr.P.C. being aggrieved by the order dated 08.11.2001 passed by the 1st Additional Sessions Judge, Durg, in Criminal Revision No.175/2001, whereby the learned Additional Sessions Judge set aside the order dated 23.05.2001 passed by the Judicial Magistrate, 1st Class, Durg, dismissing the complaint of the non-applicant herein filed against the applicant for the commission

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of offence under Sections 138 of the Negotiable Instruments Act and 420 of the I.P.C.

2. Brief facts giving rise to filing of this criminal revision are that the non-applicant/complainant and the applicant herein entered into an agreement to sale the agricultural land of 32.50 acres of Revenue Circle: Mandir Hasaud, Tehsil & District: Raipur, by the complainant to the accused/applicant for consideration of Rs.8,00,101/- and Rs.50,101/- was paid as an advance by the applicant/accused to the non-applicant/complainant and further Rs.3,50,000/- were paid as advance money through cheque bearing No.983221 dated 28.02.2001 drawn on the State Bank of India, Main Branch: Raipur. The said cheque was presented by the complainant in the Central Co-operative Bank, Durg, on 28.02.2001 and the said Bank vide its registered letter dated 14.03.2001 informed the complainant that the cheque cannot be honoured on account of insufficient amount in the said bank account and the said intimation was received by the complainant on 19.03.2001. On receiving this intimation about the dishonour of the cheque, the complainant sent a notice to the applicant herein under Registered A.D. and U.P.C. When the non-applicant/ complainant did not receive the said amount in spite of the notice, he filed a complaint against the applicant on 10.04.2001 for the offence punishable under Sections 138 of the Negotiable Instruments Act and 420 of the I.P.C.

3. The learned Judicial Magistrate conducted preliminary enquiry on the complaint and recorded the statement of the complainant and after hearing the counsel for the complainant passed an order on 23.05.2001 and dismissed the compliant observing that as the cause of action arises only when the accused after receiving the notice had not paid amount within a period of 15 days. Since no evidence has been adduced regarding the receipt of the said notice by the accused and there is no mention even in the compliant as to when the notice was received by

the accused and nor it has been stated by the complainant in his statement, therefore, the ingredients of Section 138 (c) read with Section 142 (b) of the Negotiable Instruments Act are not satisfied. The learned Additional Sessions Judge vide the impugned order allowed the revision and observed that prima facie offence under Sections 138 of the Negotiable Instruments Act and 420 of the I.P.C. are made out against the applicant herein. Therefore, the order passed by the Judicial Magistrate was set aside and the matter was remanded back to the Magistrate for passing appropriate order.

4. In this connection, relevant provisions of Sections 138 & 142 of the Negotiable Instruments Act read as under:

> "**138. Dishonour of cheque for insufficiency, etc., of funds in the account.**—Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:
>
> Provided that nothing contained in this section shall apply unless—
>
> (a) & (b) ....
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice."

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"142. **Cognizance of offences.**—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138;

(c) ...."

5. Therefore, the legal position as per the above provisions of Sections 138 (c) & 142 (b) of the Negotiable Instruments Act clearly envisages that it is the date of the actual service of the complainant's demand notice on the accused, which gives rise to cause of action under clause (c) of the proviso to Section 138 for the former to lodge the complaint under Section 138 of the Act against the latter and that this cause of action arises on the date when the said notice has been shown to be duly served on the accused and that if within 15 days of the receipt of the notice if the drawer accused pays up the dishonoured cheque amount to the payee complainant or the holder in due course of the cheque, the cause of action for the said purpose would cease to exist. In the circumstances, the crucial point for starting the cause of action is the receipt of notice by the accused for making payment of the dishonoured cheque issued by him and it is further to be seen that whether the complainant had placed sufficient material on record disclosing the actual date of service of demand notice on the accused so as to make out whether the cause of action for the former had arisen to present the compliant against the latter.

6. During the course of the arguments, Mr. Vishnu Koshta, learned counsel for the non-applicant/complainant very fairly conceded that these

ingredients are missing in the complaint as well as in the statement of the complainant recorded under Section 200 of the Cr.P.C., as it is not clear or it has not been stated in the statement of the complainant that actually when the notice of demand was received by the applicant, the accused. Therefore, to this extent the order of the learned trial Court i.e. Judicial Magistrate dated 23.05.2001 rejecting the complainant's complaint for the offence punishable under Section 138 of the Negotiable Instruments Act was right and legal and setting aside that order by the learned Additional Sessions Judge is illegal.

7. Now coming to the second question, perusal of the order of the learned Magistrate dated 23.05.2001 shows that the learned Magistrate has not passed any order regarding the commission or non-commission of offence punishable under Section 420 of the I.P.C. by the applicant herein. When the complaint was filed for the commission of offence punishable under Section 138 of the Negotiable Instruments Act as well as under Section 420 of the I.P.C., the learned Magistrate ought to have recorded his satisfaction about both the offences, whereas the learned Magistrate had simply passed order regarding offence punishable under Section 138 of the Act and had not passed any order regarding the commission or non-commission of offence under Section 420 of the I.P.C. by the applicant herein. Therefore, to this extent, remanding the matter to the learned Magistrate for passing appropriate order after going through the record is legal as no order regarding offence under Section 420 of the I.P.C. was passed by the Judicial Magistrate, 1st Class, Durg.

8. In the result, the revision is partly allowed. As far as the commission of offence under Section 138 of the Negotiable Instruments Act is concerned, the revision is allowed and the order of the Additional Sessions Judge is set aside and that of the Judicial Magistrate, 1st Class, is restored. However, as far as the complaint regarding the

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commission of offence under Section 420 of the I.P.C. is concerned, the order of the revisional Court is maintained and the learned Judicial Magistrate after hearing the counsel for the complainant and after perusal of the record, shall pass the order as to whether on the facts, evidence and record available on the complaint, offence under Section 420 of the I.P.C. is made out or not.

Sd/-
L.C. BHADOO
Judge

13th :5.2004

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